

**FILED**

SECRETARY, BOARD OF  
OIL, GAS & MINING

**Docket No. 2010-029**  
**Cause No. UIC-358.1**

**WESTWATER FARMS, LLC**, by and through its undersigned attorneys, hereby

**LIVING RIVERS DOES NOT PROVIDE A PROPER  
BASIS FOR REHEARING.**

Living River's Request for Rehearing and Modification of Existing Order ("**Request for Rehearing**") should be denied. Living Rivers has not demonstrated that a rehearing is warranted. The Board of Oil Gas and Mining's ("**Board**") Rules of Practice govern all proceedings before the Board. Those rules provide that any person affected by a final order of the Board may file a petition for rehearing. Utah Administrative Code ("**U.A.C.**") Rule R641-110-100. Living Rivers' Request for Rehearing is such a petition. Accordingly, Living Rivers acknowledges that the Board's Findings of Fact, Conclusions of Law, and

Order issued on January 13, 2011 (the “**Order**”) is a final order, and therefore, the evidentiary record in this Cause is closed.

Rule R641-110-200 specifies the content which should be included in a petition for rehearing. The Board’s Order directed Living Rivers to review Rule R641-110-200 in connection with filing a request for rehearing. See Order at ¶ 6, p.12. The rule provides:

A petition for rehearing will set forth specifically the particulars in which it is claimed the Board’s order or decision is unlawful, unreasonable, or unfair. If the petition is based upon a claim that the Board failed to consider certain evidence, it will include an abstract of that evidence. If the petition is based upon newly discovered evidence, then the petition will be accompanied by an affidavit setting forth the nature and extent of such evidence, its relevancy to the issues involved, and a statement that the party could not, with reasonable diligence, have discovered the evidence prior to the hearing.

U.A.C. Rule R641-110-200. Living Rivers has ignored the Board’s Rules of Practice.

Living Rivers’ Request for Rehearing does not specifically present any of the specified bases for rehearing. The Request for Rehearing contains no abstract of evidence in the record that Living Rivers claims the Board failed to consider, nor does it contain an affidavit setting forth the nature, extent, and relevancy of newly discovered evidence.

Living Rivers’ only stated bases for rehearing is that additional information has been submitted to the Grand County Planning and Zoning Commission and that it has “obtained an expert witness ... [who, in a preliminary discussion] indicated that there are additional questions that need to be examined . . . .” Request for Rehearing at (unmarked) p.2. Living Rivers does not expand on this newly discovered addition information nor provide an

affidavit stating that it could not have discovered such evidence prior to the hearing in this Cause.<sup>1</sup>

The Board's hearing for the Harley Dome #1 Well was held on December 8, 2010. As the Board previously observed with respect to its Order Denying Request for Continuance issued on December 2, 2010, Living Rivers had significantly more time than usual to prepare for the December 8, 2010 hearing. Living Rivers admits that it only recently obtained an expert witness. However, obtaining an expert witness nearly two months after an evidentiary hearing to present issues that were considered at the hearing does not constitute reasonable diligence to discover relevant evidence. Living Rivers chose to forgo presenting evidence at the December 8, 2010 hearing. A party's failure to present evidence at an evidentiary hearing is not a proper basis for granting a rehearing. Living Rivers does not allege or argue that the Order is unlawful, unreasonable, or unfair, nor does it provide any reasonable basis under the Board's Rules of Practice or the Utah Administrative Procedures Act to rehear Westwater Farms, LLC's ("**Westwater**") Request for Agency Action.

Living Rivers' Request for Rehearing is defective and should be summarily denied in accordance with Rule R641-110-400 ("The Board . . . may summarily . . . deny the petition").

**A STAY IS NOT NECESSARY TO PRESERVE  
LIVING RIVERS' RIGHT TO APPEAL.**

As an alternative to its Request for Rehearing, Living Rivers requests that the Board stay its Order for at least 30 days so that Living Rivers can appeal the Order to the Utah

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<sup>1</sup> Exhibit "B" to Living Rivers' Request for Rehearing contains a Memorandum dated January 24, 2011, that Living Rivers filed with the Grand County Council. A copy of Westwater's response to Living Rivers' Memorandum is attached hereto as Attachment 1.

Supreme Court. Such a stay is not necessary. By requesting a rehearing, Living Rivers has interrupted the 30-day period to appeal the Board's Order. If the Board denies Living Rivers' Request for Rehearing, the 30-day appeal period begins anew and Living Rivers will have 30 days thereafter to appeal the Order to the Supreme Court. See e.g., Order ¶ 6, p.12. Living Rivers seeks, in effect, 60 days to appeal the Order. Living Rivers does not demonstrate why it should receive special treatment from the Board or why the additional time is warranted. Living Rivers' right to appeal the Board's Order is expressly protected under the Board's Order, and therefore, Living Rivers' Request for a Stay should be denied.

For the reasons stated above, the Board should deny Living Rivers' Request for Rehearing and also its Request for a Stay. Westwater respectfully requests that the Board enter its order denying Living Rivers' requests as soon as is practicably possible.

Dated this 17th day of February, 2011.

VAN COTT, BAGLEY, CORNWALL &  
McCARTHY

By 

Thomas W. Clawson  
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## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2011, I caused a true and correct copy of the foregoing Memorandum in Opposition to Request for Rehearing and Modification of Existing Order, and in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 to be served via U.S. Mail, properly addressed with postage prepaid, upon each of the following:

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and via email to  
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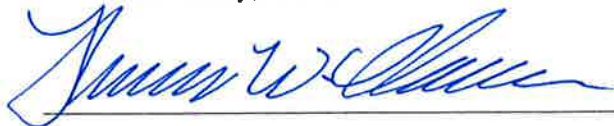
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# Supplement 1

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February 15, 2011

VANCOTT, BAGLEY,  
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ESTABLISHED 1974

Grand County Council  
Chris Baird, Chair  
125 East Center Street  
Moab, UT 84532

**Re: WestWater Farms, LLC Conditional Use Permit**

Dear Grand County Council Members:

We represent WestWater Farms, LLC ("WestWater") in connection with its application for a conditional use permit ("CUP") for the Harley Dome #1 SWD Well (the "Subject Well") located in Grand County. On February 1, 2011, during the Grand County Council's public hearing for the CUP, Living Rivers distributed a memorandum dated January 24, 2011, prepared by its legal counsel that argued that Grand County has the authority to impose a condition on the CUP requiring WestWater to drill monitoring wells between the Subject Well and the Colorado River. The avowed purpose of the monitoring wells would be to study the underground operations of the Subject Well. As explained below, we respectfully disagree. Living Rivers fails to recognize that any monitoring well would be ancillary or supplemental to the Subject Well, and therefore, within the exclusive jurisdiction of the Utah Board of Oil, Gas and Mining (the "Board").

Nevertheless, Grand County does not need to consider imposing a condition on WestWater's CUP because WestWater voluntarily has agreed with Grand County to implement a reasonable and realistic monitoring program for the Subject Well with the intent of safeguarding the Colorado River.

As a matter of federal and state law, only the Board has the authority to approve the injection of produced water underground into a Class II injection well and to condition the approval of such injection operations on the drilling of monitoring wells. The authority to approve the injection of produced water underground is governed by the federal Safe Drinking Water

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Act ("SDWA"). Under the act, Congress preempted all other laws regarding such injection operations and ordered the Environmental Protection Agency ("EPA") to administer the regulatory program. Congress also allowed that the EPA could delegate its authority to a state if the state implemented an appropriate injection control program. In 1982, the EPA approved Utah's UIC (Underground Injection Control) program and delegated its authority under the SDWA to the State. Thus, under the SDWA and as a matter of state law, only the State of Utah can approve a permit for a Class II injection well and oversee the monitoring of the well's operations.

In accordance with the EPA's delegation, the Utah Legislature mandated that the Board have exclusive jurisdiction over Class II injection wells, including all pits and ponds relating to such wells. The Legislature's intent is clear. The Board has exclusive jurisdiction over the Subject Well and any ancillary operations, such as pits and ponds. A monitoring well, however, also would be ancillary, or supplemental, to the Subject Well. Without the injection well, there would be no monitoring well. The only reasonable purpose of a monitoring well would be to provide data regarding the underground operation of the Subject Well, and only the Board could act on the data obtained by a monitoring well. Clearly, whether a monitoring well for the Subject Well is needed comes within the exclusive subject matter jurisdiction of the Board.

Living Rivers already raised the monitoring well issue with the Board. In connection with its December 8, 2010 hearing on WestWater's application for approval of the Subject Well as a Class II injection well, the Board considered Living Rivers' motion to require WestWater to drill monitoring wells between the Subject Well and the Colorado River. The Board denied Living Rivers' motion and found that the proposed injection does not present a risk to any underground source of drinking water or the Colorado River. The Board found:

Respondent Living Rivers expressed its concerns that the injected fluids will migrate to the southeast to an outcrop of the Wingate located in the canyons carved by the Colorado River near Westwater Canyon, approximately 5.8 miles from the Subject Well. . . . Westwater's evidence demonstrated that it is unlikely that either the injected fluids or formation fluids will reach the exposures of the Wingate in the Westwater Canyon area because of the lateral and vertical separation between the Subject Well and the outcrops, as well as the details of the local and regional geologic setting and nature of the injection operations.

Such a determination of non-endangerment is expressly required under the SDWA before injection of produced water may be approved. Thus, the issue regarding monitoring wells has been litigated in the appropriate forum and has been decided by the appropriate decision-maker, the Board.




The Board's finding and decision is binding on the parties to the Board's administrative proceeding, the State of Utah and all of its subdivisions (including its counties), and the public-at-large. Grand County has no authority to make a contradictory finding. Before the County may impose a condition on the CUP it must find, based on substantial evidence in the record, that the proposed project presents a reasonable risk to the health or safety of its residents. The Board has already found that the Subject Well does not pose such a risk. Grand County cannot, as a matter of law, overturn the Board's findings.

Fortunately, the issue regarding Grand County imposing a condition requiring the drilling of monitoring wells on the CUP for the Subject Well has been supplanted by WestWater's agreement with Grand County to implement a realistic monitoring program for the Subject Well. The County does not, therefore, need to challenge the jurisdiction of the Board regarding Class II injection wells.

Living Rivers' memorandum also suggests that Grand County should impose a condition requiring WestWater to report every six months on the progress it is making to complete the entire project. Living Rivers does not provide any explanation or basis for the suggested condition. Such a condition is unnecessary. Under the County's existing ordinances WestWater already is required to report annually. Grand County has ample ability to monitor the progress of the construction of the facility without special conditions.

Thank you for your consideration of these matters. We appreciate the opportunity to provide the Grand County Council with our comments.

Sincerely,



Thomas W. Clawson

TWC/mt

cc: Andrew Fitzgerald  
Patrick Shea